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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 CHRISTOPHER HEDGES, et al.,

4 Plaintiffs,

5 v.

12 CV 331 (KBF)

6 BARAK OBAMA, et al.,

7 Defendants.

8 -----x  
9 New York, N.Y.  
10 October 31, 2013  
12:00 p.m.

11 Before:

12 HON. KATHERINE B. FORREST,

13 District Judge

14 APPEARANCES

15 CARL J. MAYER  
16 BRUCE I. AFRAN  
Attorneys for Plaintiffs

17 U.S. Department of Justice  
18 United States Attorney's Office  
Southern District of New York  
19 BY: BENJAMIN H. TORRANCE  
CHRISTOPHER B. HARWOOD  
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(Case called)

THE COURT: Good afternoon. Please be seated.

MR. MAYER: My name is Carl Mayer, your Honor. I have a pinched nerve, which sometimes makes sitting difficult. Could I stand part of the time.

THE COURT: That's fine.

MR. MAYER: Thank you. I could say it demonstrates unusual deference to the federal judiciary, but that would be too obsequious even for practicing lawyer standards.

THE COURT: Whatever is comfortable.

MR. AFRAN: Good afternoon, your Honor. Bruce Afran, for the plaintiffs.

MR. TORRANCE: For the government, your Honor, Benjamin Torrance. Good afternoon.

MR. HARWOOD: Chris Harwood, for the government as well.

THE COURT: We are here after the mandate has now issued from the Second Circuit and given this Court fact jurisdiction over this case. The Second Circuit, as you all know, has significantly narrowed this case, and there's a question as to whether there's really anything left to do but dismiss the case, the court having found essentially that 1021 doesn't apply and can't apply to American citizens, which is something that we never actually argued here, but that's the Second Circuit's holding, and that it can apply to noncitizens

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1 who are both not lawful residents as well as noncitizens and/or  
2 also apprehended abroad. That's the Second Circuit's view as  
3 to quite a narrow scope of 1021.

4 Based upon that and based upon its findings with  
5 respect to Wargalla and Jonsdottir, I'm not sure there's really  
6 anything left, but let me hear from you folks as to what your  
7 view is.

8 Mr. Afran.

9 MR. AFRAN: Thank you, your Honor. We don't think  
10 that the case is narrowed to the point where it should be  
11 dismissed at this stage.

12 I'll start just with the Jonsdottir and Wargalla. The  
13 court did say on this record they don't show standing and the  
14 court was addressing the permanent injunction at that stage and  
15 the evidence that came through there. And the court was  
16 concerned that noncitizens are subject to the law and that  
17 could be applicability of it to noncitizens. I'm not sure I  
18 read it as saying that the case is precluded from going forward  
19 in discovery, but rather that as to Jonsdottir and Wargalla, on  
20 the record presented on the injunction, would not have standing  
21 to gain injunctive relief.

22 With respect to other defendants, and I don't know  
23 whether we would really pursue that at this point,  
24 Dr. Ellsberg, Dr. Chomsky and Ms. Bolen never testified, and so  
25 the record the court construed was only as to those

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1 defendants -- plaintiffs who did testify. I think your Honor  
2 was very careful to note during the hearings that your rulings  
3 would only address evidence and issues coming through those  
4 defendants who testified in the preliminary injunction stage.  
5 At least in theory, the case is ripe still with regard to those  
6 plaintiffs who have not offered any testimony at this point.

7 THE COURT: Before we go to the defendants, let me  
8 just ask you about that. I read the Second Circuit's decision  
9 as stating fairly clearly and definitively that, in the Second  
10 Circuit's view, 1021 simply couldn't apply to American  
11 citizens.

12 MR. AFRAN: Let me address that. I was about to go to  
13 the third point. What they say actually at page 52, "it,"  
14 meaning 1021, "applies only to individuals who are not  
15 citizens, are not lawful resident aliens, and are apprehended  
16 outside the United States."

17 At the last page of the decision, page 60, they state,  
18 "Hedges and O'Brien," and that reference is to the U.S. citizen  
19 plaintiffs who testified, "do not have Article III standing to  
20 challenge the statute because Section 1021 says nothing about  
21 the government's authority to detain citizens." The way we  
22 read this is twofold. One, they're rejecting standing to  
23 challenge the constitutionality of the statute, but they're  
24 clearly making a finding or a statement of law in any event  
25 that the statute cannot apply to U.S. citizens or to permanent

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1 residents lawfully residing in the U.S.

2 Our position is that this leaves open the scope for  
3 this Court to enter, upon appropriate motion, declaratory  
4 relief construing the statute and declaring its applicability  
5 as opposed to a declaration of unconstitutionality, because the  
6 Court of Appeals was only concerned, in our view, with denying  
7 standing to challenge the validity of the law. But they  
8 clearly go out of their way to say the law cannot apply to the  
9 U.S. citizen plaintiffs.

10 THE COURT: I see. Your argument, Mr. Afran, is the  
11 Second Circuit's holding is really a holding as to standing and  
12 there is still room left for declaratory judgment as to the  
13 scope of the statute somehow apart from standing.

14 MR. AFRAN: Apart from unconstitutionality of the  
15 statute.

16 THE COURT: You'd have to have somebody who had  
17 standing to pursue that, to take it any further.

18 MR. AFRAN: I think the court is saying there's no  
19 standing here to declare the statute facially invalid, and  
20 that's really what they say at page 60 in their final  
21 conclusion. But if they're going out of their way to say at  
22 the same time the statute cannot apply to U.S. citizens or does  
23 not apply to U.S. citizens and they also acknowledge, though  
24 its language doesn't address that point, it seems to me that  
25 there is standing to say that there's a justiciable controversy

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1 as to whether the broad language of the statute or its  
2 undefined language can apply to American citizens, and that's  
3 apart from the declaration that it's illegal.

4 THE COURT: Who would have, in your view, the standing  
5 to pursue that declaration? Would it be Jonsdottir and  
6 Wargalla?

7 MR. AFRAN: They're not American citizens, so they  
8 wouldn't fall into that category. That would be irrelevant  
9 from their point of view since they're neither citizens nor  
10 permanent residents. But any U.S. citizen plaintiff or  
11 permanent resident, I think they're all citizens as opposed to  
12 permanent residents.

13 MR. MAYER: Bolen.

14 MR. AFRAN: And Bolen did not yet testify. She's a  
15 citizen. Dr. Ellsberg, Dr. Chomsky and Hedges and O'Brien are  
16 U.S. citizens, so they would have standing, we believe, to seek  
17 a declaration that the statute does not apply to U.S. citizens  
18 because that is still an issue that by the language of the  
19 statute, rather, its absence of language, does arise.

20 THE COURT: Under the declaratory judgment act, to  
21 seek a declaration, there has to be an actual controversy  
22 between the litigants. And I guess the question is, approached  
23 from even the angle which you're suggesting which I'm trying to  
24 get my head around, whether or not there is such a controversy  
25 at this point on this complaint because the complaint, as

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1 drafted, and the Second Circuit's opinion and everything that's  
2 occurred in this litigation up to this point, is really based  
3 towards something else, which appears to be resolved as to  
4 American citizens by the Second Circuit.

5 MR. AFRAN: What's interesting is there's no order  
6 stating that it does not apply to American citizens. They're  
7 simply stating in *dictum*, essentially, it does not apply in its  
8 scope to American citizens.

9 THE COURT: I thought it was quite clever.

10 MR. MAYER: And it's also in contradiction to the  
11 executive pronouncements of the President that it does apply to  
12 citizens, the President won't use it, and to Congress who  
13 subsequently tried to amend the statute to make it clear.

14 THE COURT: Right. But we all know that no matter  
15 what any other evidence could be brought to bear in terms of  
16 the American citizens, I can't go against what the Second  
17 Circuit has said. They are controlling authority on me, and  
18 whether another district court someplace else decides something  
19 differently, that's for another day, another time, another  
20 person. The question is what do we think is left on this  
21 complaint and as to whom.

22 I hear what you're saying, Mr. Afran, in terms of the  
23 American citizens and I'll hear from Mr. Harwood and  
24 Mr. Torrance in just a moment, but tell me a little bit about  
25 your view, the two of you, Mr. Mayer and Mr. Afran, about

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1 Wargalla and Jonsdottir. Is there anything left as to them?  
2 Based upon what the Second Circuit's indicated they would have  
3 to have, I would think, for standing, is there anything that  
4 could remotely begin to establish that, or is it effectively  
5 DOA as to them?

6 MR. MAYER: I think it might be appropriate to have  
7 some limited discovery on the question of to what extent these  
8 people might be targeted. It's not outside the realm of  
9 possibility that there is some targeting of these particular  
10 plaintiffs. We don't have any evidence to that effect at this  
11 moment other than what we put in the complaint. But I would  
12 say given the recent revelations of targeting of many different  
13 individuals by the intelligence agencies, I think maybe some  
14 limited discovery on that point would be appropriate.

15 THE COURT: We know that we can't just have a  
16 complaint for a fishing expedition. Your burden, as  
17 plaintiffs, is to show an actual case or controversy that opens  
18 the door to discovery, particularly the kind of discovery which  
19 you're talking about which undoubtedly would bring into play,  
20 if there are any such investigations, lots of issues of  
21 national security and things of that nature.

22 Let me just comment that the various types of  
23 monitorings that I think you referenced really are quite  
24 different from targeting in the sense of targeting an  
25 individual for military detention or possibly substantially



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1 supporting al-Qaeda and the Taliban. They could be the same,  
2 but they could be really quite different than just gathering of  
3 information.

4 Let me hear, if I could, and then we'll go back and  
5 forth, from Mr. Torrance and Mr. Harwood as to their view as to  
6 what's left and what should be done with this case and then  
7 we'll iterate.

8 MR. AFRAN: Your Honor, may I just note, you did ask a  
9 question about whether there is a case or controversy with the  
10 U.S. citizen plaintiffs. After I rise again, I'll address  
11 that.

12 THE COURT: Thank you.

13 MR. TORRANCE: Thank you, your Honor. Benjamin  
14 Torrance, for the government.

15 There is nothing left in this case. Your Honor's  
16 characterization as a clear and definitive rejection of  
17 standing by any United States citizen is correct. That is  
18 exactly what the Second Circuit said at page 40 of the slip  
19 opinion. It took them all of one paragraph to categorically  
20 dismiss any idea that there is any injury to any U.S. citizen  
21 from the statute. Regardless of whether Dr. Chomsky or all the  
22 other U.S. citizen plaintiffs have testified, they are out of  
23 this case. There is nothing left to them.

24 As to the noncitizens, they have offered what they  
25 purport to be their injury for constitutional standing purposes

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1 in the complaint. They offered, both of them, no remaining  
2 noncitizen plaintiffs. They have offered their view of their  
3 threat and their view of what injury they may have suffered in  
4 their testimony before this Court. The Second Circuit has  
5 considered that and found it to fall short, so there's nothing  
6 left as to them either.

7 Mr. Mayer's proposition that we engage in discovery is  
8 not proper. That would essentially serve as an attempt to  
9 substantiate the speculation as to what kind of threat may or  
10 may not be present as to them. If they cannot allege it, if  
11 they cannot show it in their testimony, then their complaint  
12 fails for lack of standing.

13 Under the Second Circuit's holding, there is nothing  
14 left in this case, and we ask the Court to dismiss it.

15 THE COURT: Thank you, Mr. Torrance. I can't say that  
16 I'm surprised.

17 MR. TORRANCE: I tried not to surprise. Thank you.

18 THE COURT: Mr. Afran, I told you I would let you  
19 address what you think might be a case or controversy that  
20 could be left as to American citizens because you've got to  
21 have a case or controversy even to get towards a declaratory  
22 judgment to establish standing, etc., etc.

23 MR. AFRAN: The interesting thing is that your Honor  
24 made the reference to a sort of clever approach, which is  
25 something the Court can say, but we shouldn't say, about the

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1 Court of Appeals.

2 THE COURT: I say that only because they did something  
3 that nobody here ever argued, which is that the statute can't  
4 apply to any American citizen.

5 MR. AFRAN: Oh, I see.

6 THE COURT: I thought that was quite interesting and  
7 something that had never been raised before, but I'm happy to  
8 have it said by the Second Circuit.

9 MR. AFRAN: It's a new fact, essentially. Not a fact,  
10 but it's a new aspect of this case that didn't exist before;  
11 namely, that the court is now opining, it's somewhat in *dictum*,  
12 but it is laced through the opinion that the statute's language  
13 does not apply to U.S. citizens or permanent residents. If I  
14 say U.S. citizens, the Court should assume I include permanent  
15 residents as well. And that is something that was not really  
16 argued here because the plaintiffs look at the statute and say  
17 its broad language contains no such exceptions for the many  
18 reasons we've argued here before. And the government, for its  
19 part, refused to make a declaration or declaratory statement in  
20 this court that it does not apply to American citizens or U.S.  
21 citizens or permanent residents, so the language or currency  
22 among all of us at the trial level was that there is an issue  
23 here as to how and when it could apply to American citizens.  
24 The government's position was as to these plaintiffs, their  
25 activities, we don't think, are within the statute anyway, but

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1 the government refused to say that the statute cannot be used  
2 as to U.S. citizens and persons in the U.S., and so the Court  
3 of Appeals has now stated in its understanding the statute does  
4 not allow such application.

5 THE COURT: Let me put it differently. It has, and  
6 this is important, interpreted the statute as not applying to  
7 American citizens, which is why I don't know that any American  
8 citizen could establish standing, which leads us to Ellsberg  
9 and Chomsky and the other individuals that you have mentioned  
10 who are citizens.

11 MR. AFRAN: I only referenced them because they didn't  
12 testify. In theory, they could have evinced evidence that they  
13 are subject to a greater degree of threat than those who did  
14 testify.

15 THE COURT: I think the Second Circuit would have said  
16 it wouldn't even matter what degree of threat they felt because  
17 they could not have been detained under 1021.

18 MR. AFRAN: They said that. They say an American  
19 citizen cannot be, and we took the position that Congress would  
20 have no power to do that for reasons under Milligan and Hamdi  
21 and other series of decisions where the military cannot have  
22 such custody. Now, the Court is saying the statute does not  
23 allow for that or does not do that. But the court's opinion is  
24 not an order that has any binding effect on the government. It  
25 is at best persuasive authority to be used potentially in some

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1 other case, and so the way in which the statute by order gets  
2 interpreted really has to be through the trial court, and we  
3 believe that the Court of Appeals is stating that the statute  
4 cannot be applied to U.S. citizens as a point of interpretive  
5 law, but it does not yet have a binding impact on the United  
6 States. And there is a case in controversy because, firstly,  
7 the statute, by its language, and the Court of Appeals  
8 acknowledges this, does not exempt U.S. citizens, and the court  
9 says it has its broad language.

10 The government has stated we're not going to agree  
11 here that this statute does not apply to U.S. citizens. We're  
12 not going to agree that the President has no such power under  
13 the statute, and so there is still a case in controversy  
14 because we have U.S. citizens who engage in behavior that is  
15 arguably, in some cases, close to the line, so to speak, in  
16 terms of what one would see as giving substantial support to  
17 these types of groups and ideologues, and we have the  
18 government in this very court saying we will not go so far as  
19 to agree that this will not be enforced against U.S. citizens.  
20 So we have a case in controversy because we still have people  
21 who say we have activities that are not precluded by the  
22 language of the statute and the government says we will not  
23 exempt U.S. citizens.

24 Now that we have a rule of law from the Court of  
25 Appeals saying that's true, U.S. citizens can't be included, I

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1 think we're entitled to declaratory relief as to the scope of  
2 the statute's enforcement capacity and reach.

3 THE COURT: Let me ask Mr. Torrance what he thinks  
4 about that particular argument. And let me just repeat it, not  
5 because you didn't hear it, but because I want to make sure  
6 that I got at least a sufficient version of it in my mind that  
7 I'm meeting what Mr. Afran is saying.

8 Mr. Afran is saying that the Second Circuit has made  
9 statements that the statute doesn't apply, or doesn't appear to  
10 apply, to American citizens but acknowledges that the statute  
11 on its face doesn't so state, and so the Second Circuit has  
12 held that there could be no interpretation of the statute; the  
13 Second Circuit has held that American citizens cannot be  
14 detained pursuant to the statute, but that that is all in the  
15 context of a standing decision and not in the context of an  
16 order that is putting forth a declaration as to the scope of  
17 the legislation itself and that the case or controversy which  
18 continues to exist is whether or not the scope of the statute  
19 is as the Second Circuit has stated, and if it is, they're  
20 entitled to an order so stating.

21 Did I get it anywhere clear?

22 MR. AFRAN: I think that's absolutely clear.

23 THE COURT: Mr. Torrance.

24 MR. TORRANCE: I would say that that formulation is as  
25 Mr. Afran said and I think it contradicts itself, but to say

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1 that we have a case or controversy as to whether the Second  
2 Circuit correctly stated the law is in and of itself  
3 self-contradictory because the Second Circuit makes the law in  
4 this circuit. Unless and until the *en banc* court or the  
5 Supreme Court reverses it, that opinion is the law in this  
6 circuit. There's no need for a separate order. I'm not aware  
7 of any procedure in which a circuit by issuing any binding  
8 decision followed by its judgment, followed by its mandate,  
9 which serves effectively as an order and under this court's  
10 local rules intends to be automatically adopted as orders of  
11 the district court that that ends the case, but putting that  
12 aside, the point is that that makes it law in the circuit, and  
13 there's no need for any more.

14 Your Honor is quite correct to say we need standing in  
15 order for any kind of action, declaratory judgment or  
16 otherwise. To say that there's something still out there that  
17 could be addressed on the declaratory judgment or to say that  
18 the Second Circuit's opinion only addressed standing is  
19 irrelevant. Yes, it only addressed standing, but Mr. Afran  
20 said it's *dictum*. It's absolutely not *dictum*. The  
21 construction of the statute is crucial to the reasoning by  
22 which the Second Circuit says there is no standing  
23 categorically for U.S. citizens, that they absolutely needed  
24 that.

25 THE COURT: Could I ask you a question.

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1 MR. TORRANCE: Please.

2 THE COURT: And I know I did this to you a lot during  
3 the trial.

4 MR. TORRANCE: It's my job.

5 THE COURT: Based upon what you just said, isn't it  
6 the case that, in the context of dismissing, if the Court were  
7 to dismiss Jonsdottir or Wargalla, it could do so in its  
8 opinion which said that the government acknowledged that the  
9 law in the Second Circuit is that 1021 does not apply to U.S.  
10 citizens?

11 MR. TORRANCE: We certainly acknowledge that the  
12 Second Circuit held that, yes. I'm not quite sure what the  
13 utility is of simply repeating. I mean, there should be no  
14 controversy that the government acknowledges that the Court of  
15 Appeals for the Second Circuit makes law in the Second Circuit.

16 THE COURT: I think the issue is a difference between  
17 having an order which says definitively the Second Circuit has  
18 held that this does not apply to U.S. citizens or calling it  
19 *dictum*, that the Second Circuit has held that X plaintiffs  
20 don't have standing, which is the holding, versus the *dictum*  
21 that part of the basis for that is their interpretation that it  
22 can't apply to U.S. citizens. You may find that to be a  
23 distinction without real substance, but I think that that's  
24 partly the point.

25 MR. TORRANCE: I would not say it's a distinction



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1 without real substance. I would say it's a false distinction.  
2 It's not *dictum*. Any reasoning on which the Court of Appeals  
3 relies in order to reach its holding becomes the law in the  
4 circuit. So they clearly relied on their construction of  
5 Section 1021 in order to reach their holding that U.S. citizens  
6 have no standing to challenge this statute.

7 I do want to say, as an aside, that Mr. Afran talking  
8 about how the face of the statute doesn't clearly say anything  
9 about U.S. citizens is incorrect. What the Second Circuit said  
10 is that 1021(b) does not say anything about U.S. citizens, but  
11 1021(e) does. So the statute, the section of the statute,  
12 taken as a whole, quite clearly does say something about U.S.  
13 citizens, and the Second Circuit's interpretation of that is  
14 binding on this Court and on parties within this court unless  
15 and until it's reversed.

16 I think this is all a little bit academic. The point  
17 is that the Second Circuit's decision binds everybody in this  
18 room, and that compels dismissal.

19 MR. MAYER: If I may, your Honor. May I just respond  
20 to one point and make another.

21 The first is that in referencing section (e) as being  
22 somehow distinction from section (b), it's very clear from the  
23 statute that all of the sections operate together. In other  
24 words, (b) sets out categories of people who might be covered  
25 or activities that might be covered and then (c), which

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1 operates together with (b) and with (e), indicates what the  
2 military could do if it sought to bring in those individuals.  
3 It could put them before a military tribunal. It could hold  
4 them indefinitely. And the particular provision I want to  
5 focus on, which I think relates to the declaratory judgment, is  
6 section (c) I believe (3), which allows the military to send  
7 anyone, and it doesn't limit it to citizens or noncitizens, to  
8 a foreign power or to any foreign entity, like a foreign secret  
9 service, so I don't think the exercise is academic.

10 The question is, and this is why I think a declaratory  
11 judgment would be appropriate, if a U.S. citizen was taken by  
12 the military and sent to a foreign country, there is a  
13 possibility that one would never know of the whereabouts of  
14 that person and how would that person ever have standing in a  
15 court in the United States. How would they ever exercise their  
16 habeas rights?

17 I had a bit of this colloquy with Judge Lohier in the  
18 Second Circuit argument. It really wasn't in the opinion. I  
19 think you touched upon it lightly in your opinion, but it's  
20 that provision that makes this worrisome. It's sort of an area  
21 that I've never seen before. You could have the authority to  
22 take people, including U.S. citizens, render them to a foreign  
23 country, and how would that person ever have standing. And how  
24 would you ever challenge that provision?

25 THE COURT: I hear you, but it strikes me that the

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1 Second Circuit has a very extensive and thorough opinion on  
2 this case and review of what we all did here in terms of the  
3 trial record that we presented to them and then on my  
4 rationale, and we can't relitigate that which they have  
5 decided. They have decided that (c) does not apply to American  
6 citizens.

7 Let's talk for a minute about Jonsdottir and Wargalla  
8 because I think there are two separate issues here. One is is  
9 there any way of you folks arguing effectively -- and I don't  
10 mean that in terms of advocacy; I mean that in terms of a  
11 matter of law -- that there's anything left for the American  
12 citizens piece, because I have to say that I am more with  
13 Mr. Torrance on this than not, but I am listening closely  
14 because I had not considered what I would call the thin end of  
15 the wedge that Mr. Afran is posing. But separate and apart  
16 from that, I see Jonsdottir and Wargalla on this record,  
17 putting aside discovery about what some agency of the U.S.  
18 Government may be doing, as insufficient to withstand  
19 additional scrutiny and that what I am supposed to do is  
20 dismiss as to them.

21 MR. AFRAN: May we have one moment, your Honor.

22 THE COURT: Yes.

23 MR. AFRAN: Your Honor, I don't think that as to  
24 Jonsdottir and Wargalla we're aware of any other additional  
25 evidence at this point. Now, it's conceivable that,

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1 particularly as to Wargalla, in the year or so since she  
2 testified, there may be things she's done or things she's come  
3 in contact with that would enhance her position. For example,  
4 if you recall, she was associated with a group that was listed  
5 on the London Metropolitan Police terrorist watch list. It's  
6 conceivable that her activities have continued. To be honest,  
7 we have not been in touch over the last few months, so we can't  
8 say at this stage if that has happened.

9 Based on what we know at this point, we are not aware  
10 of any other evidence. None has come to our attention.

11 THE COURT: Let me suggest that we do the following.  
12 I think that based on the current record and the current  
13 complaint and the way it's currently structured, given the  
14 Second Circuit's ruling, I would need to dismiss it.

15 MR. AFRAN: Is your Honor referring to the entire  
16 complaint or Jonsdottir and Wargalla at this point?

17 THE COURT: The entire complaint. However, if you  
18 believe there is a way of articulating additional evidence or  
19 something else that would keep it alive, what I will allow the  
20 plaintiffs to do is to take 30 days, 45 days, tell me what you  
21 need, to consider whether or not you want to try to, I'm not  
22 going to say it's going to automatically be accepted and you've  
23 got the battle of the opinion that you've got, but if you want  
24 to articulate it in some way so we have a clear target to shoot  
25 at, then we would do that in the context of a Rule 15 motion.

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1 It would be an amended complaint with a Rule 15 motion to have  
2 it accepted, and then the government would probably oppose it  
3 on the basis of futility, almost no matter what, unless there's  
4 something extraordinary about Jonsdottir and Wargalla that  
5 comes to light in your further investigation, or some other  
6 plaintiff. But I think that might be the way to proceed so  
7 that we've got your best position clearly articulated. The  
8 government can then meet it and then either the Second Circuit  
9 disposes of it entirely and it's a relatively straightforward  
10 order of dismissal, or not.

11 MR. AFRAN: I think, your Honor, if it wouldn't burden  
12 the Court's schedule, or the government for that matter, we  
13 might prefer 90 days, and the reason for that is we have a cert  
14 petition due on the 16th of December, and it may well be that  
15 we'll have a reply brief at some point in that time period as  
16 well to consider. So, frankly, our efforts on this litigation  
17 over the next four to five weeks are going to be focused on  
18 that. If we could do 90 days, that might make more sense from  
19 our point of view.

20 THE COURT: That's fine with me because right now it  
21 is sort of sleeping on my docket.

22 MR. AFRAN: Okay.

23 THE COURT: Obviously, if you end up with cert, then  
24 that puts it into a different position altogether. Are you  
25 talking about cert in this case?

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1 MR. AFRAN: Yes, from the Second Circuit's opinion  
2 because it was injunctive, we have the right even though they  
3 remanded it.

4 THE COURT: And even though I've gotten the mandate  
5 back.

6 MR. AFRAN: I think we still have that capacity.

7 THE COURT: Let's put out 90 days. At the end of  
8 January, why don't we say January 30, and if you're a few days  
9 over that, let me know in advance so I know you're not just  
10 forgetting about it.

11 MR. AFRAN: That will actually give us time in terms  
12 of dealing with any reply brief on the cert as well. We'll  
13 still get a window.

14 THE COURT: Then I would suggest you can make what I  
15 would expect to be a very short motion to amend.

16 We can do it either way, Mr. Harwood, Mr. Torrance.  
17 We can do it as you're opposing on the basis of futility and  
18 you can raise your arguments there, or you can take in the  
19 complaint and say that you're going to reserve all rights and  
20 move against it as 12(b)(6). But given the kinds of arguments  
21 that people are making, this may be a Rule 15 motion more than  
22 anything else. But I leave that for you folks to decide, and  
23 that would be done in relatively short order after this.  
24 January 30, and then you folks decide how you want to brief it  
25 after that.

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1 MR. AFRAN: So essentially we report to the Court by  
2 the 30th.

3 THE COURT: You give me a proposed amended complaint,  
4 if you think there are facts.

5 MR. AFRAN: We're not going out of our way. It's just  
6 if our investigation allows for that.

7 THE COURT: If your investigation allows for that.  
8 And if it doesn't allow for that, then I'll do what I think,  
9 having considered the various positions people have put forward  
10 today as appropriate, either for a plan for the future or  
11 dismissal based upon the Second Circuit's order.

12 MR. AFRAN: Your Honor, could I address one other  
13 issue.

14 THE COURT: Yes.

15 MR. AFRAN: With respect to the thin end of the wedge,  
16 one thing that I think needs to be, I think, recognized is that  
17 what the Second Circuit was considering was only your Honor's  
18 ruling with respect to facial invalidity. And they were not  
19 addressing at all the question of the scope of application or  
20 even an as-applied challenge.

21 THE COURT: They said they never had to get to any of  
22 that because there wasn't standing. Their view was they didn't  
23 have to get to any of the substance of the actual  
24 constitutional challenges since there was insufficient basis  
25 for standing.

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1 MR. AFRAN: I would agree with that. However, in  
2 stating the law does not apply to U.S. citizens and permanent  
3 residents in the U.S., I think firstly, they are raising an  
4 issue for consideration at this level. I don't think they  
5 would have put it in that context and remanded it were it not  
6 in the court's mind that this is something that needs to be  
7 considered. And in view of the fact that it was never raised  
8 by either side here, it creates a new climactic or climatic  
9 aspect of the law governing this set of cases, and so we think  
10 that the standing question is really focused on the  
11 constitutionality. But one does have standing, if the  
12 government -- let me lay it out very quickly without rehashing  
13 too much.

14 If the government is still of a posture that it will  
15 not say from its point of view that 1021 does not apply to U.S.  
16 citizens, then I think we still have a case in controversy with  
17 respect to the true application of the statute.

18 THE COURT: Do you think you have that in the Second  
19 Circuit? I mean, maybe you have that in the Third Circuit or  
20 the First Circuit or the Fourth Circuit. But this is precisely  
21 the point. I don't know that you have it in the Second Circuit  
22 because the government is as any other litigant, and if the  
23 government attempted to come in here tomorrow against a  
24 challenge, say that somebody who was American was detained and  
25 you, Mr. Afran and Mr. Mayer, represented them in some action



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1 and you moved to dismiss, I don't know how I would get  
2 jurisdiction over this, if there's a habeas petition or  
3 something like that.

4 MR. AFRAN: There would have to be.

5 THE COURT: And somehow it ended up here and not in  
6 D.C.

7 MR. AFRAN: Wherever the brig is.

8 THE COURT: I would think that this district would  
9 have to dismiss based on the Second Circuit's precedent.

10 MR. AFRAN: I think it would, without question. But  
11 that does not foreclose a pre-enforcement action if the  
12 government is still not stating that it will not apply the  
13 statute to U.S. citizens. And so I think that the *dictum* in  
14 that case, and it is *dictum* because the holding was not that.  
15 The holding was no standing because of no fear of imminent  
16 enforcement, but if the *dictum* within that is that this is  
17 doesn't apply to U.S. citizens and we still have a situation in  
18 which the government refuses to disavow the applicability of  
19 the statute, as your Honor pointed out earlier in the  
20 litigation, there is a national jurisdiction on certain  
21 questions. And just because in the Second Circuit there is a  
22 ruling that says in this circuit one can't be detained under  
23 this if they're a U.S. citizen, not a ruling, but *dictum*, that  
24 does not mean that U.S. citizens who are in other jurisdictions  
25 in this case -- and they are, Noam Chomsky is in the First

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1 Circuit, Dan Ellsberg is in California, Jennifer Bolen is in  
2 Washington -- it does not mean that they do not have the right  
3 to say, Wait a moment, in the Second Circuit, that may be  
4 applicable, but I live in Seattle, I live in the First Circuit,  
5 I live in California, but I'm a plaintiff in this case. If  
6 that *dictum* is binding circuit in the Second Circuit  
7 ultimately, then this Court does have the authority to say as  
8 to these other plaintiffs there's applicability on a national  
9 basis.

10 THE COURT: Maybe you want me to transfer it to  
11 Boston.

12 MR. AFRAN: No. I don't think that's necessary. I  
13 think the Court made the point earlier that although normally  
14 your jurisdiction would be within the Southern District, there  
15 are cases in which this Court has reached beyond, and that's  
16 why you issued the injunction you did. The Court of Appeals  
17 never criticized that aspect of this Court's decision.

18 THE COURT: I hear all of what you're saying. I think  
19 that it suggests that the motion you may want to put on top of  
20 any amended complaint or nonamended complaint may be lengthier  
21 than I was suggesting. It may not be the short, two-page  
22 motion to amend. Then we'll give time to the government to  
23 respond and we'll just proceed as appropriate. January 30, put  
24 something in. That will set the stage for our next steps. And  
25 that's where we go. In the meantime, it sounds like you folks

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1 have got the various activities going on in, with this case  
2 elsewhere, and so you'll be proceeding with those.

3 MR. AFRAN: We will.

4 THE COURT: January 30.

5 MR. AFRAN: And our deadline there, Justice Ginsberg  
6 extended that to the 16th of December.

7 THE COURT: If you're not going to make the 30th for  
8 any reason or there is any other reason for extensions and the  
9 January 30 is not going to work, let me know so we don't think  
10 that you're just forgetting about us.

11 MR. AFRAN: Your Honor, your law clerk advised any  
12 communications like that should go through ECF. Is that the  
13 procedure we should follow?

14 THE COURT: Yes. You're welcome to write letters,  
15 copied to everyone. They can now be filed on ECF in the  
16 Southern District. They didn't used to be able to filed on  
17 ECF, but they now can be, which is a wonderful thing, so  
18 everything is permanently available. Go ahead and file if you  
19 need an extension of time. Or if you want to notify the Court  
20 of a development, you can do that by letter.

21 MR. AFRAN: Thank you for the adjournment. It helped  
22 out in that other matter.

23 THE COURT: Anything further, Mr. Torrance?

24 MR. TORRANCE: No. Thank you, your Honor.

25 THE COURT: Thank you. We are adjourned.